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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 793.

SINCLAIR OIL & GAS COMPANY,
Petitioner,

v.

R. B. MASTERSON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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R. B. MASTERSON, *et al.*,

Respondents.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

REPLY BRIEF FOR PETITIONER.

It appears that Respondents now agree that there does not exist in the law of the State of Texas an implied covenant to explore for oil as distinguished from the implied covenant to reasonably develop.

The Trial Court rendered its decision prior to the time that the Supreme Court of Texas handed down its decision in the case of *Clifton* v. *Koontz*, 325 S. W. 2d 684, in which the Texas Court held emphatically that there does not exist under the law of the State of Texas an implied covenant to explore for oil as distinguished from an implied covenant to develop. The decision of the Supreme Court of Texas in the *Clifton* case was called to the attention of the Court of Appeals but that Court refused to follow the

law as declared by the Supreme Court of Texas and affirmed the erroneous decision of the Trial Court.

An examination of the Trial Court's findings of fact, conclusions of law, and the decree entered thereon and affirmed by the Court of Appeals, can lead to no conclusion except that the Courts below followed the erroneous theory that there does exist under the law of the State of Texas an implied covenant to explore for oil as a covenant separate and distinct from an implied covenant to reasonably develop. It is also stated in a letter dated March 31, 1958 from the Trial Court addressed to counsel that in its opinion there is destined in the law of Texas an implied covenant to conduct exploratory operations on a lease in search of a mineral covered by the lease but not yet found (R. 178). In the petition at page 9, that part of the aforesaid letter is quoted.

The Trial Court again in its conclusions of law in paragraph 5 (R. 185) said:

> "5. Defendant, as the owner of the oil rights under such leases, had, at the time this suit was filed, failed to exercise reasonable diligence *in exploring the leased* premises for oil, and the drilling that has been done by defendant since the suit was filed *does not constitute adequate exploration.* Plaintiffs are not deprived of the right to a decree of specific performance of the implied covenant *for adequate exploration* because of *inadequate exploration activities* carried on during the pendency of this suit." (Emphasis ours)

Again in paragraphs 7 and 8 of the conclusions of law (R. 186) the Court said:

> "7. Under the facts of this case, no burden rests on plaintiffs to show that the drilling of any or all such *exploratory wells* would result in profit to defendant. (Emphasis ours)

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> "8. Defendant has failed to exercise reasonable diligence *in exploring for oil* the lands described in the complaint, and plaintiffs are entitled to equitable relief." (Emphasis ours)

In the decree in paragraph 1 (R. 205) Petitioner is directed to drill six *exploratory* wells annually for five years and in the same paragraph of the decree it is provided in part:

> "• • • None of such *exploratory wells* shall be drilled within one mile from a then producing oil well on the Masterson land • • •." (Emphasis ours)

In paragraph 2 of the Court's decree (R. 206) it is provided:

> "If defendant fails to complete all of the *exploratory wells* • • •." (Emphasis ours)

In paragraph 6 of the decree (R. 207) it is provided:

> "6. Whatever burden is on defendant by implied covenant for further oil development in the localities where oil has already been or is hereafter found on the Masterson land to drill up, extend or define any particular area for production shall not be relieved or altered in any way by the drilling of *exploratory wells* as herein directed; nor shall any *exploratory well* also count as a development well in respect to any such present area of production." (Emphasis ours)

In the aforesaid paragraph the Court emphatically made it clear that the wells directed to be drilled are to be exploratory wells and not development wells and that no exploratory well ordered to be drilled shall also count as a development well. As further evidence that the Court proceeded under the erroneous theory that

there does exist in the law of Texas an implied covenant to explore for oil as distinguished from an implied covenant to reasonably develop, there is the fact that the Court, in paragraph 8 of the decree (R. 208), dismissed so much of the plaintiff's complaint as seeks a decree for adequate development (as distinguished from adequate exploration).

The wells ordered to be drilled were certainly not to be development wells and were described in the conclusions of law and in the decree (paragraph 1) as "exploratory wells". That they were to be purely exploratory wells is made clear by paragraph 1 of the decree. None of such exploratory wells shall be drilled within one mile from a then producing oil well on the Masterson land unless such well be drilled to the "pre-Pennsylvanian beds", as to which formation or depth no definition was given in the decree or by any evidence introduced in the case. There was no proof or any offer of proof by the Respondents that a well drilled further than one mile from a then producing oil well on the Ranch would reasonably be expected to be productive of oil in paying quantities.

Petitioner recognizes that the law of the State of Texas implies a covenant to reasonably develop an area after oil has been discovered in paying quantities. Petitioner was actively and progressively engaged during the trial of this case in the development of the area on the Masterson land where Petitioner had discovered oil. The Trial Court must have been satisfied that such area was being reasonably developed by Petitioner and must have been satisfied with the development progress being made or it would not have dismissed that part of the petition relating to adequate development, leaving before the Court only the question of exploration.

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Respondents in their discussion of the meaning of the words "explore" and "exploratory" refer to the use of such words by the Court in *Sauder* v. *Mid-Continent Petroleum Company*, 292 U. S. 272. The facts in that case are entirely different from the facts in the case before this Court. That case arose and was tried in the State of Kansas and it is assumed that the Kansas law was applied to the case. In the *Sauder* case there was one producing oil well 660′ East of the East line of the lease. There were two producing oil wells 200′ South of the South line of the lease and one producing oil well 200′ West of the West line of the lease. (See decision of Court of Appeals in that case—67 F. 2d 9.)

In the *Sauder* case this Court said (at page 277):

> "The district judge found that the two wells were drilled as off-sets and had been producing oil in small but paying quantities. He summarized the evidence as to drilling on adjacent territory, and found that there was some probability that damage was being done to the leasehold through drainage by wells on adjoining properties. * * *"

Also at page 278, this Court said:

> "The question for decision is whether the respondent failed to comply with an implied covenant to develop the tract with reasonable diligence. * * *"

In the *Sauder* case the lease in question covered a small tract of land consisting of 320 acres, surrounded by producing oil wells which apparently were draining oil from under the leased land. The lessee was certainly under an implied covenant to develop and protect the lease from drainage. There is no drainage issue involved in the case before this

Court for the reason that there was no oil being produced within 15 or 20 miles of the Masterson Ranch. Petitioner was producing from wells it had drilled on the Ranch. In the *Sauder* case the question before the Court was the implied covenant to develop the tract. There could not have been in question an implied covenant to explore because the tract was surrounded by producing oil wells, three of which were within 200 feet of the lease line. Certainly the lessee in that case was under an implied covenant to develop the lease because the acreage embraced in the lease was proven acreage.

Respondents try to explain why the Trial Court dismissed that part of the petition relating to development. On page 6 of their brief they quote a part of paragraph 6 of the decree (R. 207) but do not complete the sentence. They omit the balance thereof which provides:

> "; nor shall any exploratory well also count as a development well in respect to any such present area of production."

On page 6 of Respondents' brief it is stated that at the hearing plaintiffs presented a suggested program under which defendant would be required to pay an annual rental of $2.00 per acre on all land it desired to retain. Reference is made to other provisions of such program which Respondents say were suggested. While we believe that this is not a proper matter to present to this Court, we believe we should explain the position Petitioner took in rejecting the program. Petitioner rejected any such offer for the reason that the oil and gas leases, both as to oil and as to gas, were in full force and effect and Petitioner should not be required to pay $2.00 per acre annual rental. Each lease in this case provides that it shall remain in full force and effect and shall be valid as to both the oil rights and the gas

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rights so long as either oil or gas should be produced from the land covered by such lease. (R. 176, par. 11; and 184, par. 2).

Prior to the time the case was filed, 114 productive gas wells had been drilled on the Masterson land (R. 174, par. 8). For several years the Respondents had been receiving in gas royalties more than $500,000.00 per year (R. 325). Certainly gas is being produced in enormous quantities from the Masterson Ranch. Therefore the leases under their express provisions, including Petitioner's oil rights, remain in full force and effect and should not be cancelled upon an erroneous theory that Petitioner must drill wildcat wells in search for oil only. Respondents admit that the land embraced in the subject leases has been adequately developed for gas and that great quantities of gas are being produced therefrom. (R. 175).

Respondents, for the first time, have developed a new and novel theory of an implied covenant to develop. While outwardly purporting to accept the nature of the implied covenant of reasonable development, Respondents now seek to divide such covenant into two parts, the "first step" being the drilling of exploratory (wildcat) wells and the "second step" being the drilling of development wells after oil in paying quantities has been found. Respondents seek to support the "two step" theory of the covenant of reasonable development by referring to one sentence in *Flewellen* v. *Simms Oil Co.*, 134 S. W. 2d 687 (reversed at 156 S. W. 2d 521) which referred to exploration as one of the initial steps in development.

A lessee may, of course, by his own choice and election, drill a wildcat well but under the law of the State of Texas there certainly is no implied covenant imposing upon the lessee the duty or obligation to drill a wildcat or exploratory well in the absence of express provisions for such drill-

ing. The *Flewellen* case, as it developed on appeal, did not at all concern the question of an implied covenant to explore as in the case before this Court, but was concerned primarily with an express covenant authorizing non-development, except to protect the land covered by the lease against drainage.

Conflict of Decisions.

Petitioner contends in its petition that the Court below refused to follow the law of Texas as declared by its Supreme Court in the *Clifton* case and that such refusal will give rise to a conflict of decisions between the Federal Courts and the State Courts when there is involved the question of an alleged implied covenant to explore. Petitioner's contention is supported by a very important recent decision by the Court of Civil Appeals in and for the Eighth District at El Paso, Texas, in the case of *Felmont Oil Corporation, et al., Appellants* v. *Pan American Petroleum Corporation, et al., Appellees.* The opinion of the Texas Court of Civil Appeals was rendered on March 30, 1960 and is as yet unreported. A copy is attached as an Appendix to this reply brief, and a certified copy of such opinion is being filed with this brief. In the *Felmont* case the Court of Civil Appeals had before it the question of an implied covenant to explore as distinguished from an implied covenant to reasonably develop. The facts in the *Felmont* case are similar to the facts in the case before this Court in that there were two leases involved in the *Felmont* case covering a large tract of land consisting originally of more than 31,000 acres in Winkler County, Texas, and both of the leases were dated in March, 1925. Some of the land originally embraced in the leases had been released. The Court of Civil Appeals refused to recognize an implied covenant

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to explore as a covenant distinct from an implied covenant to reasonably develop and followed the decision of the Supreme Court of Texas in the *Clifton* case and quoted with approval from the decision in that case. The Court of Civil Appeals, near the end of its decision (Appendix p. 25), said:

> "Appellants have called our attention to the recent case of Sinclair Oil & Gas Company *v.* Masterson, 271 F. 2d 310, by the Fifth Circuit, which case purports to distinguish and follow the *Koontz* case. We do not think this case has distinguished the facts of the *Koontz* case, nor do we believe it follows it. • • •"

The Texas Court of Civil Appeals, in concluding its comments on the instant case, said:

> "We decline to follow the Masterson case."

The *Felmont* case furnishes adequate support for the reason given by Petitioner for granting the writ. It has now been demonstrated that a Texas Appellate Court does not recognize the decision of the Court of Appeals in the instant case as authority in Texas. It now appears that Texas Courts will not follow that decision. The Court in the *Felmont* case holds that the case before this Court is not distinguished from the *Clifton* case. The Texas Court of Civil Appeals was of the opinion that the Court of Appeals in this case did not follow the rule announced by the Supreme Court of Texas in the *Clifton* case.

In their brief Respondents refer to some authors of text books and Law Review articles and to some cases arising in states other than Texas. If some authors or Courts in some other jurisdictions recognize implied covenants to explore as distinguished from implied covenants to develop, they do not determine the law of Texas.

Respondents rely heavily on Law Review articles published by Professor C. J. Meyers. His theory was expressly repudiated by the Supreme Court of Texas in the *Clifton* case at page 697. It must be noted that the articles referred to by Respondents were written prior to the Texas Supreme Court's declaration in the *Clifton* case and before the Court of Appeals issued its opinion herein. The correctness of the judgment must be considered in the light of established legal principles as declared by the highest Court of Texas, and not in the light of the pronouncements of controversial writers, especially those whose theories have been expressly repudiated.

Conclusion.

It is respectfully submitted that the Petition for Certiorari be granted.

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Proof of Service.

I, NAT. J. HARBEN, Counsel of Record for Sinclair Oil & Gas Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of April, 1960 I served a copy of the foregoing Reply Brief For Petitioner on attorneys for R. B. Masterson, et al., Respondents, by mailing a copy airmail postage prepaid in an envelope addressed to Culton, Morgan, Britain & White, attention Mr. D. H. Culton, P. O. Box 189, Amarillo, Texas.

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APPENDIX A.

COURT OF CIVIL APPEALS

EL PASO.

FELMONT OIL CORPORATION, *et al.*, Appellants, *vs.* PAN AMERICAN PETROLEUM CORPORATION, *et al.*, Appellees.	No. 5378. Appeal from the District Court of Winkler County.

Opinion.

This is a suit brought by appellants, Felmont Oil Corporation and others, owners of certain undivided interests in the surface and minerals in and under the Hendrick Ranch in Winkler County, for cancellation, either outright or conditionally, of certain portions of two oil and gas leases on the Hendrick Ranch.

The two leases involved in this litigation are each dated March 27, 1925; each was executed by T. G. Hendrick and wife, Ida Hendrick, as lessors, to J. W. Grant, as lessee; and together the two leases cover forty-nine sections, or an aggregate of 31,260 acres of land in Winkler County. The T. G. Hendrick lease, so-called because his name appears first as lessor (sometimes referred to in this opinion as "Lease A"), covers sixteen sections, or a total of 10,240 acres. The Ida M. Hendrick lease, so-called because her name appears before that of her husband as lessor (sometimes referred to in this opinion as "Lease B"), covers thirty-three sections of land, or a total of 21,120 acres in Winkler County.

Appellants' suit for cancellation of portions of the two leases is based on the alleged ground that the defendant-

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lessees and their predecessors in title had breached the implied covenant in the leases to explore particular areas of these two leases held by Pan American Petroleum Corporation and Westbrook-Thompson Holding Corporation, appellees, referred to in the court below as the "Leaseholding Defendants". This suit by appellants is also brought against a large number of other defendants, who are identified as the "Mineral Owning Defendants", of which group John R. Thompson and thirty-two mineral and royalty owners, as appellees, have filed their brief herein, and have adopted the briefs filed by appellees Pan American and Westbrook-Thompson.

Each of the two leases was for a primary term of twenty years from March 27, 1925, and as long thereafter as oil or gas, potash or other minerals, or either of them, is produced from the said land. It is undisputed that on or about February 10, 1929 a well, producing oil in paying quantities, was completed on Lease "A", and since that date oil in paying quantities has been continuously produced from portions of the land covered by Lease "A". It is also undisputed that on or about November 6, 1926 a well, producing oil in paying quantities was completed on Lease "B"; and since that date oil in paying quantities has been continuously produced from portions of the land covered by Lease "B". Thus, oil in paying quantities was obtained from each lease within the primary term thereof.

Appellees Pan American and Westbrook-Thompson, the "leaseholding defendants", together own approximately 5,685 acres of the original 10,240 acres covered by Lease "A", and approximately 13,325 acres of the original 21,120 acres covered by Lease "B", or a total of approximately 19,010 acres of the 31,360 acres covered by the two leases. Of the remaining 12,350 acres covered by the original base leases, certain portions thereof have been released from the oil and gas leases. Certain other portions of the remaining 12,350 acres remain subject to one or the other of the two leases, but are owned by operators other

than Pan American and Westbrook-Thompson; however, these other lessees are not parties to this suit.

Of the 5,685 leasehold acres owned by appellees under Lease "A", appellants seek to cancel, in some manner, 4,630 acres, or all but 1,055 acres of appellees' leasehold interest in Lease "A". The 1,055 acres upon which no cancellation is sought is apparently that portion of Lease "A" owned by appellees in Section 46, Block 26, P. S. L., and Sections 35 and 40, Block B-5, P. S. L., under which appellants own no interest of any character. As to Lease "A", appellants seek cancellation to all depths, on 3,730 acres, and cancellation below the depth of 3,200 feet on 900 acres.

It is appellants' position that they seek cancellation only upon those portions of the two base leases owned by appellees Pan American and Westbrook-Thompson. Appellees claim to own only 13,325 acres out of Lease "B", but appellants seek cancellation of 13,570 acres out of this lease. Cancellation as to all depths on 8,780 acres and cancellation below the depth of 3,200 feet on 4,790 acres is sought.

It is appellants' contention that the appellees Pan American and Westbrook-Thompson have only partially explored some of the acreage, and have wholly failed to explore the remainder of the acreage on which they seek cancellation; that 900 acres under Lease "A", and 4,790 acres under Lease "B", are "partially unexplored", and cancellation of such land below 3,200 feet is sought because of the alleged failure of appellees to explore this acreage below depths of 3,200 feet. There is no contention by appellants that appellees have failed to explore the shallower depths above 3,200 feet below the surface.

With respect to the remainder of the acreage sought to be canceled under the two leases, appellants contend that the implied covenant of exploration has been broken to all depths, shallow and deep, and seek cancellation of the leases on such acreage to all depths.

After trial to a jury, a take-nothing judgment was rendered on the verdict, in favor of appellees. This is an appeal from that judgment.

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This appeal is predicated upon fifteen points of error. Appellants have divided these points into five main groups for purposes of argument, and they will be discussed by us in the same manner.

I. By Points 1, 2 and 3, appellants maintain that, since plaintiffs sought cancellation of only certain portions of the two leases for inadequate exploration as to such certain portions, the trial court erred in asking the jury about exploratory operations by appellees on all portions of the two leases held by said appellees; that the trial court erred in asking the jury, in Question No. 1, about exploratory activities on all the Ida Hendrick Lease (Lease "B"), owned by these two appellees; and in Question No. 6 in asking the jury about exploratory activities on all the T. G. Hendrick lease (Lease "A"), owned by these two appellees.

In answering Questions 1 and 6, the jury found that appellees Pan American and Westbrook-Thompson, or their predecessors in title, had drilled or caused to be drilled, on Lease "A" and Lease "B", respectively, as many exploratory well or wells below the depth of 3,200 feet on those portions of the leases owned by them as a reasonable, prudent operator would have done under the same or similar circumstances.

On the date that the two basic leases were executed and delivered, the lessee therein, J. W. Grant, owed to the lessors, T. G. and Ida Hendrick, only the obligations contained in the two leases, either expressly or by implication. The implied obligations of development and exploration owed by the lessee in each of these two leases was a single unified obligation affecting each lease as a whole. We believe the law of Texas is well settled that the lessor may not subdivide or separate the single unified obligation, and thus impose a subsequent burden on his lessee greater than the burden assumed by such lessee when he accepted the lease. Since the lessor may not, himself, arbitrarily separate or subdivide the express or implied obligations imposed on the lessee by the terms of the lease, it follows that such lessor would not be permitted to accomplish this

indirectly, by the sale of the minerals to numerous parties in segregated tracts and parcels, and thus subdivide what was theretofore a single unified obligation affecting the lease as a whole, into countless separate obligations, each of which would be subject to further fractionization or division in the event of further sales by the purchasers thereof.

We think it is equally well settled that the express and implied covenants contained in the lease are covenants running with the land and are imposed upon each taker of any part of the lease as a consideration of his holding it. In this respect, the express and implied covenants of the lease are severable, and impose upon the holder of each segregated part the obligation to reasonably explore and develop such segregated portions after production has been obtained on the lease.

Cowden v. *General Crude Oil Co.*, 217 S. W. 2d 109;
Cosden Oil Company v. *Scarborough*, 55 Fed. 2d 634;
Cox v. *Sinclair Gulf Oil Co.*, 265 S. W. 196.

Appellants concede that they have been unable to find any Texas authority in support of their contention that the lessees' development and exploratory obligations are divisible with respect to various portions of the lease. However, appellants have cited *Perkins* v. *Mitchell*, 268 S. W. 2d 907, by our Supreme Court, which we think does no more than apply the rule announced above, to the effect that the express and implied covenants of the lease are severable, not at the option or election of the lessor or his assigns, but as a result of the subdivision of the lease by the lessee or his assigns into two or more segregated tracts or parcels. The covenants contained in the lease follow every part and parcel of the lease, and impose upon each holder a single unified obligation to reasonably explore and develop that portion of the lease held by him. In the *Perkins* case (*supra*), the original 203.4-acre lease had been divided by assignments into two tracts—a 40-acre tract owned by Shields, and a 163.4-acre tract owned by Mitchell. There

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had been sufficient development on Shields' 40-acre tract, but no development of any kind on Mitchell's 163.4-acre tract. The inquiry was not whether there had been sufficient development upon the entire original 203.4 acre lease, but was whether Mitchell had sufficiently developed the 163.4-acre portion of the original lease held by him. The court did not hold that Mitchell's obligation to develop the acreage held by him was divisible as to particular parts or parcels of such 163.4-acre tract, but, we think, considered Mitchell's obligation as a single unified obligation affecting, as a whole, only that part of the original lease held by him.

Appellants also cite *Willingham* v. *Bryson,* 294 S. W. 2d 421, by the Fort Worth Court of Civil Appeals. The pertinent holdings in this case have been overruled by the Supreme Court in *Clifton* v. *Koontz,* 325 S. W. 2d 684, and we believe there exists no necessity to distinguish it from the facts of this case.

The two leases involved in this litigation are fully assignable, in whole or in part. When a portion of a lease, such as the leases here involved, is assigned, the obligations contained in the lease, either expressly or by implication, are imposed upon the taker of such segregated part. The obligation on the part of the holder is to the segregated portion of the lease, and is a single unified obligation affecting such segregated portion as a whole.

The obligations imposed by the terms of the lease upon the original lessee, or upon subsequent holders of various portions of such lease, can neither be enlarged nor diminished solely by virtue of a change or changes in the mineral and royalty ownership in the lands covered by such lease.

We hold that the trial court properly directed its inquiry in Question No. 1 to the whole of the segregated portion of Lease "B"; and, in Question No. 2, to the whole of the segregated portion of Lease "A" owned by appellees, Pan American and Westbrook-Thompson; treating the obligations of these appellees with respect to the portions of each lease owned by them as a whole, imposing but a single unified obligation with respect to each lease. It is imma-

terial that appellants owned no minerals under some of the land, or, for other reasons, sought no cancellation on part of the lands held by appellees under each of the two leases. The obligation, if any, of appellees to "explore" affected the whole of the portions of each of the leases owned by them, and was indivisible. Appellants' Points 1, 2 and 3 are accordingly overruled.

II. The fourth point of error raised by appellants is the complaint that the trial court erred in confining all jury issues to exploratory activities below 3,200 feet.

Appellants sued to cancel, as to Lease "A", 900 specified acres, solely to depths below 3,200 feet, and 3,732 specified acres to all depths, both above and below 3,200 feet. As to Lease "A", appellants sued to cancel 4,790 specified acres solely to depths below 3,200 feet, and 8,780 specified acres to all depths.

The trial court confined the issues to exploration below 3,200 feet and, since the court rendered a take-nothing judgment, presumably it found, by implication, that there was no evidence of probative force to support or raise any issue of development or exploration as to any formation above 3,200 feet.

Rule 277, Texas Rules of Civil Procedure, authorizes the submission of a special issue only when raised by both the written pleadings and the evidence. While appellants' requested issue was raised by the pleadings, this alone is insufficient; it must also be raised by the evidence.

Where there is no evidence to raise a certain issue, or the evidence is insufficient to raise such issue, the issue should not be submitted.

Premier Petroleum Co. v. *Box*, 255 S. W. 2d 298 (err. ref.), 257 S. W. 2d 105;
Texas City Terminal Ry. Co. v. *McLemore*, 225 S. W. 2d 1007;
Gray County Gas Co. v. *Oldham*, 238 S. W. 2d 596.

In the trial of this case, appellants relied heavily on the *Willingham* case *(supra)*, by the Fort Worth Court of Civil

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Appeals, which opinion has been rejected by the Supreme Court in *Clifton* v. *Koontz (supra)*, at least insofar as the *Willingham* case sought to draw a distinction between the implied covenant to "explore" and the implied covenant to "develop". There the Supreme Court, speaking through Justice Smith, said:

> "We hold that there is no implied covenant to explore as distinguished from the implied covenant to conduct additional development after production in paying quantities has been obtained.... We agree that under the terms of the lease, the lessee has the right to explore, but it does not necessarily follow that the lessee is under a duty to explore . . ."

Where there is no duty to explore, there can be no error in the trial court's refusal to submit issues inquiring about exploration to all depths on those portions of the two leases sought to be canceled to all depths, including depths above 3,200 feet.

This case having been plead and tried, and the issues submitted in substantial compliance with the rule announced in the *Willingham* case, we are of the opinion that appellants failed to plead or prove a cause of action. Consequently, had the trial court submitted all the issues in the exact manner requested by appellants, and even had all such issues been answered favorably to appellants, the jury verdict thereon would have been worthless, and could not have supported a judgment of cancellation of the part of the two leases held by appellees, either outright or conditionally. In such case, the failure of the trial court to submit appellants' requested special issues presents no reversible error.

Assuming as we do that there is no valid distinction between the implied covenant to "explore" and the implied covenant to "develop", the burden rests upon appellants to do more than merely prove that a ready, able and willing operator would drill, regardless of the certainty of profit. Appellants are required to prove:

(1) That the lessees failed to measure up to the standards of the prudent operator;

(2) That producing strata or horizons, which they contend should have been further explored or drilled, required additional wells;

(3) That strata or horizons other than those from which production is being obtained (on which further exploration or drilling is sought), exists in reasonable probability;

(4) That by the drilling of additional wells, there would be a reasonable expectation of profit, not only to the lessor, but also to the lessee.

Clifton v. *Koontz* (Sup. Ct.), 325 S. W. 2d 684;
Texas Pacific Coal & Oil Co. v. *Barker*, 117 Tex. 418, 6 S. W. 2d 1031;
Brewster v. *Lanyon Zinc Co.*, (8th Cir.), 140 F. 801;
Rhoads Drilling Co. v. *Allred*, 123 Tex. 229, 70 S. W. 2d 576.

Appellants failed to discharge the burden of proof on these items, no testimony being offered on any of them. The court correctly entered a take-nothing judgment as to all the leasehold interests involved in this litigation above 3,200 feet. Appellants' fourth point is accordingly overruled.

III. Appellants' Points 5 and 6 are complaints that the trial court erred in refusing to permit the jury, anywhere in its charge, *to locate the exploratory wells*, if any, that a reasonable, prudent operator would drill on Lease "B"; and to *locate the exploratory wells*, if any, that such an operator would drill on Lease "A".

In the absence of any evidence of a reasonable expectation of profit from the drilling of additional exploratory wells at locations selected by the jury on each of the two leases, no duty is imposed on the lessee to continue the performance of the implied covenant to explore and develop the leased premises.

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In addition, after having reviewed all the evidence, both pro and con, and considering only the evidence most favorable to appellants' contention, we are of the opinion that the evidence was insufficient to warrant the submission of any issues requesting the jury to *locate* the exploratory wells, if any, that a reasonable, prudent operator would drill on either of the two leases.

Appellants' Points 5 and 6 are accordingly overruled.

Under the same grouping, by Points of Error 9 to 13, inclusive, appellants urge that the trial court erred in its refusal to submit appellants' requested Special Issues 1 through 5, on exploratory activities below 3,200 feet on Section 28, Block B-5, a part of Lease "B", owned by appellees; the refusal of the court to submit appellants' requested special issues on exploratory activities, both to all depths and below the depth of 3,200 feet, on various segregated, specifically described tracts of land under each of the two leases.

Had the court submitted the special issues requested by appellants, the result would have been to authorize the fragmentation of the over-all burden of the lessees to reasonably explore and develop that part of each lease held by them. It would have divided the single unified obligation owed by appellees with respect to all of Lease "A", into two or more separate groups, omitting entirely from the jury's consideration exploration and development operations by appellees on other parts of the same lease, under which appellants either owned no interest or had concluded, as to such omitted part, that appellees' implied duty to explore and develop had been satisfied. It would also have divided, in the same manner, the lessees' obligation on Lease "B" into at least three parts.

In the *Koontz* case *(supra)*, the Supreme Court specifically pointed out that it did not have before it a factual situation where the lease covers several thousand acres, and an effort is being made to hold such vast acreage by showing production from a comparatively small area, nor did it have a situation where an unreasonably long time had elapsed since the last development of the leased premises.

In its opinion, the court did not pass upon these questions. Such questions are, however, inescapably before us in the case now under consideration.

Out of the 10,240 acres covered by Lease "A", lessee-appellees own 5,685 acres; and, out of the 21,120 acres covered by Lease "B", lessee-appellees own 13,325 acres.

The evidence reflects that a total of approximately 80 wells have been drilled by or for the lessee-appellees, or their predecessors in title, on the acreage owned by them under Lease "A", and that approximately 235 wells have been drilled by or for said appellees, or their predecessors in title, on the acreage owned by them under Lease "B". Obviously, all and every part of each so vast a lease cannot be fully explored and completely developed in a single operation. After production, the lessee is required to reasonably develop the remainder of the lease held by him, and if he fails to do so, he may suffer the loss of all or part of his leasehold estate. We do not believe, however, in the absence of specific authority under the terms of the lease, that the lessors or mineral owners may direct the precise location of any well, or determine the order in which any portion of such lease or leases shall be developed, except where the failure to drill a particular well results in drainage of the leased premises.

The question for the jury is whether the lessee-appellees in this case, considering the development that has taken place to date, and the number of wells drilled on each particular lease down to the time of trial, have failed to reasonably develop those portions of each of the leases held by them, in the manner of a reasonable, prudent operator, with due regard and consideration to the interest of the lessors as well as the lessees. We do not believe that the lessors, or mineral owners, seeking to cancel a lease for alleged failure of the lessees to reasonably explore and develop the leased premises, regardless of the size of the particular lease, may properly divide or compartment the lease, either vertically or horizontally, so as to exclude from the jury's consideration whatever measure of development and exploration, if any, such lessees may have contributed, down to

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the date of trial, to their total obligation to explore and develop the whole of the lease held by them. We find no error in the trial court's refusal to submit appellants' special requested issues and, accordingly, appellants' Points 9 through 13 are overruled.

IV By Points 7 and 8, appellants contend that the trial court erred in framing Question No. 3 and Question No. 8 so as to compel the jury to find a "uniform depth" to which a reasonable, prudent operator would drill all exploratory wells, if any, on Lease "A" and Lease "B". We think such contention is without merit. We have examined the issues complained of, and are of the opinion that such issues would have permitted the jury to find different depths for each of as many wells on the two leases as they believed a reasonable and prudent operator would drill. Points 7 and 8 are overruled.

V. By Points 14 and 15, appellants contend that the trial court erred in submitting Question No. 1 and Question No. 6, because lessee-appellees, having drilled so few wells, on so large a quantity of land, over a period of more than thirty years, had breached the covenant of exploration on both leases, as a matter of law, and appellants were entitled to a judgment of cancellation as prayed for.

We do not agree with appellants' contention. Some wells having been drilled on each of the leases held by appellees, a fact question is presented, which is within the exclusive province of the jury and may not be determined by the court.

We hold here, as was held by the Supreme Court in the *Koontz* case, *supra,* that there is no implied covenant to explore, as distinguished from the implied covenant to conduct, additional development after production in paying quantities has been obtained.

As we see it, from the manner in which this case was tried, and from the briefs, appellants not only contend that the implied covenant to "explore" is a separate and distinct obligation from that imposed by the implied covenant to "develop". They also contend: (1), that the obligation

to "explore" can only be discharged by drilling activities, and there is no burden on appellants to show that such exploration could be conducted with reasonable expectation of profit; (2), that the obligation to "explore" may be separately imposed, not only as to separate strata or horizons, but also separately as to any specified area, and into as many separate areas, or portions of the lease, as plaintiff might elect to carve, and all without the necessity of crediting the lessee (whether such lessee has drilled 80 wells or 235 wells on the leasehold estate held by him) with whatever measure of exploration, if any, the lessee may have contributed toward the discharge of his total obligation to the whole of that part of each lease held by him.

We think "exploration" of the leased premises need not be confined exclusively to "drilling activities". In our opinion it is but one of several accepted methods by which oil, gas and other minerals may be located. The evidence reflects that a great deal of exploration of the two leases has been conducted by the appellees through the application of geophysical methods, beginning with the "torsion balance survey" in 1931, followed by other methods down through the years—the gravity meter survey in 1942; a magnetic survey in 1939; an aeromagnetic survey in 1950; a seismograph refraction survey in 1943; reflection seismic surveys, and by numerous experimental seismograph methods. These surveys indicate an almost continuous effort on the part of the appellees to "explore" the lands held by them for the purpose of locating all of the oil and gas reservoirs, if any, underlying those areas of the two leases held by them.

Some of the geophysical work has been highly successful and resulted in the location of the Emperior-Devonian and the Ellenburger fields on the Hendrick leases, upon which appellees have drilled producing wells. In addition, appellees have, through the medium of farmout operations, dry hole money, bottom hole money, and other mediums, promoted and encouraged the drilling of wells by other operators on the acreage covered by the two leases, and on acreage off the two leases, but adjacent to or related to the

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area of the two leases held by them. We think the geophysical work conducted on these two leases, and appellees' contribution to exploratory wells on nearby lands, constitutes exploratory activities, just as does the drilling of exploratory wells, and may not properly be excluded from the jury's consideration in determining whether there has been a breach of the lessees' implied obligation to explore.

Appellants have called our attention to the recent case of *Sinclair Oil & Gas Co.* v. *Masterson,* 271 F. 2d 310, by the Fifth Circuit, which case purports to distinguish and follow the *Koontz* case. We do not think this case has distinguished the facts of the *Koontz* case, nor do we believe it follows it. In the *Masterson* case, the court had before it 31 separate oil and gas leases, each entitled to enforcement with respect to the implied covenants to explore, develop and produce. The court there declined to enforce the implied covenants imposed by each of the leases, presumably on the ground that to do so would impose too heavy a burden on the defendant. Instead, the court treated the 31 separate leases as though they were a single lease covering 90,000 acres. In the absence of an agreement, or the consent of the parties, we know of no rule by which a Texas court would be authorized to take such action. We decline to follow the *Masterson* case.

Appellants' Points 14 and 15 are overruled, and the judgment of the trial court affirmed.

(signed) JIM C. LANGDON,
Chief Justice.

Opinion filed March 30, 1960

(SEAL) CLERK'S OFFICE

COURT OF CIVIL APPEALS

EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

El Paso, Texas.

April 11th, 1960.

I, E. J. REDDING, Clerk of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, at El Paso, do hereby certify that the preceding 14 pages contain a true and correct copy of the opinion of the Court of Civil Appeals, delivered by Honorable Jim C. Langdon, Chief Justice, on the 30th day of March, A. D. 1960, in cause No. 5378 *Felmont Oil Corporation, et al.*, Appellants, vs. *Pan American Petroleum Corporation, et al.*, Appellees, now on file in my office at El Paso.

IN TESTIMONY WHEREOF, I have hereunto set my hand with the seal of said court, the same day and date above written.

E. J. REDDING,
Clerk.

(SEAL)

By H. S. POTTER,
Deputy.

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